IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1743

FRANK PETER DOYLE, JOHN HERBERT CHARLES NAYLER and GEORGE NEWBOLD ROLINSON,

Petitioners,

—v.—

JOHN C. SHEEHAN,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALBERT L. JACOBS, JR.
JACOBS & JACOBS, P. C.
521 Fifth Avenue
New York, N. Y. 10017
Attorneys for Petitioners Frank Peter Doyle, John Herbert Charles Nayler and George Newbold Rolinson

Of Counsel:

ALBERT L. JACOBS
MARK H. SPARROW
BRUCE M. COLLINS

Memorandum and Order

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 75-1218

JOHN C. SHEEHAN,

Plaintiff, Appellee,

—v.—

DOYLE *et al.*,

Defendants, Appellants.

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

Entered: March 3, 1976

Doyle petitions for rehearing and alternatively for certification pursuant to 28 U.S.C. § 1254(3). Just as Doyle's appeal was an attempt to reargue, contrary to normal principles of *staré decisis,* a decision of this court that was rendered less than a year previous, the present petition attempts contrary to our local rules to reargue the issues already argued on appeal. In hindsight, our decision was phrased more mildly than it should have been, given Doyle's tactics and arguments; we did not, as normally we would and as urged by appellee, flatly characterize Doyle's appeal as frivolous. Rather, we entertained Doyle's argu-

ments to make certain that our views on the discovery issue reflected the best judgment of which we were capable.

This apparently was not enough for Doyle. Indeed, it may have stimulated him to believe that we welcome endless appellate review even if we do not welcome endless discovery. Overlooking that this circuit consists of but three active judges, all of whom sat on his appeal, Doyle now demands an *en banc* hearing, and suggests that our relevant circuit rule tailored to the size of this court is improper. This peculiar approach is, by itself, unimportant, since apart from the rules all members of this court join in rejecting the request for an *en banc* hearing, and we know of no rule change that could transform three judges into more. We are left, however, with the unfortunate impression that counsel might not have been engaging in empty threats when he indicated during oral argument that if the issue went against his client, it would be presented again and again, implying, perhaps, that he might push the judicial process to, and even beyond, its limits in retaliation for anything less than victory. We still hope that we misread counsel in this regard, but the nature of the present petition does not encourage us.

Doyle gives as one ostensible reason for rehearing that he should not be taxed, like most losing parties, for the costs of his appeal. Doyle makes no mention of the fact that the appeal was taken in the face of very recent and clear circuit precedent. So obvious was this that the district court ruled against Doyle without opinion, and appellee took the position, with obvious justification, that because of our previously announced position, Doyle's appeal was frivolous. Doyle's professed surprise, therefore, at being taxed costs can only be described as amazing. Indeed,

Doyle's argument as to costs is so contrived that we wonder whether instead of being advanced in good faith it is designed merely to circumvent our local Rule 15.

The rest of the petition consists of a rehash of previous arguments, including reference to a second circuit decision with which we are entirely familiar, interlaced with the strident demand that we explain ourselves to appellants' satisfaction, and the warning that our views, like those of the third circuit and the editors of the Harvard Law Review, are completely unacceptable, and, indeed, do not represent existing law.

We well understand a losing party's disappointment, and as we indicated in our opinion, we appreciate the desirability of a resolution of the issue presented in the case as to which the circuits have split. We do not claim infallibility. We cannot, however, condone counsel's inability to grasp that there must be finality to a judicial proceeding.

Finally, we are not persuaded that any useful purpose would be served by the certification procedure requested if, indeed, it was appropriate for such a request to emanate from appellant. C. Wright, Law of Federal Courts, 479-80 (2d ed. 1970).

The petition for rehearing is denied, as is the request for hearing *en banc* and for certification to the Supreme Court.

By the Court:

/s/ Dana H. Gallup
Clerk